No. 84-1539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

VS.

RUDY BLADEL,

Respondent.

REPLY BRIEF

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ARGUMENT

I

THIS COURT SHOULD GRANT PETITIONER'S REQUEST AND ISSUE A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT SINCE THE DECISION OF THE MICHIGAN SUPREME COURT RESTED ON FEDERAL GROUNDS.

Respondent in his Brief in Opposition To The Petition claims that the decision of the Michigan Supreme Court rests on adequate independent state grounds. Petitioner disagrees.

The Michigan Supreme Court did cite the parallel state constitutional provision concerning the right to counsel, Michigan Constitution, Article I, Section 20. See *People v.*

Bladel, 421 Mich 39, 68; ____ NW2d ____ (1984). Petitioner submits that the mere citation of the Michigan constitutional provision does not establish a separate, adequate and independent state ground. The decision of the Michigan Supreme Court relied most heavily on federal constitutional law. While there was some consideration of cases which applied the state law of other states, there was no significant discussion of any application of Michigan law. It is clear that the Michigan Supreme Court based its decision upon its analysis of federal law. The citation to the Michigan constitutional provision was merely a recognition of the parallel between the Sixth Amendment and Article I, Section 20 of the Michigan Constitution. The dependency of the decision on Sixth Amendment analysis is illustrated by the following:

> We need not decide this question since a violation of the Fifth Amendment right to counsel is not involved in either of these cases. We have merely extended the *Edwards/Paintman* rule by analogy to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const. 1963, art 1, § 20. Given the Supreme Court's holding that *Edwards* established a new "bright line" test, the fact that this Court has not previously articulated precise procedural standards for waivers of the Sixth Amendment right to counsel, and the diverse approaches adopted in other jurisdictions, the rules articulated herein will apply to the instant cases, those cases tried after this opinion is issued, and those cases pending on appeal which have raised the issue. (*People v. Bladel, supra*, 421 Mich at 68.)

While the second sentence of the above quoted paragraph refers to both the Sixth Amendment and the state constitutional provision, Michigan Constitution 1963, Article I, Section 20, the following sentence refers only to the Sixth Amendment. It is illogical to conclude that the Michigan Supreme Court grounded its decision on an independent violation of an Article I, Section 20 right when the rules established for the protection of that right are derived exclusively from the Sixth Amendment. Clearly, the decisional basis for this case was the Sixth Amendment. The mention of Article I, Section 20 was the mere recognition that there is a "state constitutional counterpart".

Petitioner rightly cites the relevant law controlling this question, *Michigan v. Long*, 458 US 966; 103 SCt 3469; 77 LE2d 1201 (1983), that this court has authority to review the merits of a state case if:

> . . . a state court decision appears to rest primarily on federal law, or to be interwoven with the federal law and when the adequacy and independence of any possible state law ground is not clear from the fact of the opinion. (*Michigan v. Long, supra*, 458 US at ____; 103 SCt at 3476; 77 LE2d at 1214.)

As demonstrated by the quotation from *Long, supra*, analysis of the authority of this court to review a state court decision is not a matter of a clear dichotomy between reviewable and nonreviewable cases. Rather than coming to this court in one of two isolated boxes separated by a great expanse, cases fall according to their individual facts somewhere on a continuum ranging from the clearly reviewable to those clearly based on independent and adequate state grounds. Therefore, it is the peculiarities of each case which determine its reviewability by this court.

In *Delaware v. Prouse*, 440 US 648; 99 SCt 1391; 59 LE2d 660 (1979), this court held that it was proper to review a state court decision which cites as the basis for its ruling both federal and state constitutional provisions, as did the

Michigan Supreme Court in the case at bar. The *Delaware* court's decision revealed that the *Delaware* court would interpret the state constitutional provision automatically in accord with the Fourth Amendment. The similarity of *Prouse* to the case at bar makes Justice White's comments as appropriate here as they were in *Prouse:*

> This is one of those cases where 'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.' *Zacchini v. Scripps-Howard Broadcasting Company,* 433 US 562, 568; 97 SCt 2849, 2853; 53 LE2d 965 (1977).
>
> (*Delaware v. Prouse, supra,* 440 US at 653, 99 SCt at 1395).

The Michigan Supreme Court's inclusion of Article I, Section 20 of the Michigan Constitution within its opinion did not constitute a square holding that the actions violated the state constitution such that the decision of the Michigan Supreme Court was immunized from review by this court. See *Payton v. New York,* 445 US 573, 600; 100 SCt 1371; 63 LE2d 639, 659 (1980) and *Herb v. Pitcarin,* 324 US 117; 65 LE2d 459; 89 LE 789 (1945). At the very least, this court should relieve the state court from its misapprehension of federal law and free it to decide this case under state law. *Delaware v. Prouse, supra,* 440 US 653; 99 SCt at 1396.

The crux of the rationale behind the refusal to grant Certiorari where there is an independent and adequate state ground, is this court's unwillingness to grant advisory opinions. Thus, the most appropriate test of whether there is an adequate and independent state ground is to determine whether the same result would obtain in the state court regardless of this court's correction of the misapprehension

of federal law. *Herb v. Pitcarin,* 324 US at 124; 89 LE 794-795.

The history of the Michigan Supreme Court's treatment of right to counsel cases demonstrates that any decision by this court on the Sixth Amendment will have an impact on the Michigan Supreme Court's interpretation of Article I, Section 20 of the Michigan Constitution. The history of Michigan law demonstrates that Article I, Section 20 of the Michigan Constitution has been consistently read as identical to the Sixth Amendment and further that when there has been an overt attempt to give a broader interpretation of Article I, Section 20 than that given to the Sixth Amendment, such expansive reading has been rejected by a majority of the court.

In *People v. Williams,* 386 Mich 565; 194 NW2d 337 (1972), the Michigan Supreme Court addressed the question of the propriety of the trial court's refusal to grant an adjournment for the purpose of allowing a defendant to obtain new counsel where a valid dispute arose between defendant and his counsel one day prior to trial. The discussion of the importance of the right to counsel in *Williams,* showed the identity between the federal and state constitutional provisions. The court stated:

> Yet [the right to counsel] is guaranteed by the US Constitution and has been included in every constitution of this state since Michigan entered the Union. (Footnotes omitted). (*People v. Williams, supra,* 194 NW2d at 342).

Clearly, the Michigan Supreme Court in *Williams* viewed the right to counsel as a singular right identically protected by both the state and federal constitutions.

In *People v. Bellanca,* 386 Mich 708; 194 NW2d 863 (1972), the Michigan Supreme Court was confronted with

the question of whether grand jury transcripts should be made available to assist trial counsel in cross-examination. The court stated:

> These statutory provisions must be read in conjunction with the provisions in Const. 1963, Art. I § 20 that 'in every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him, . . . to have the assistance of counsel for his defense.'
>
> We read this last provision to accord a defendant the same assistance of counsel contemplated in the Sixth Amendment to the United States Constitution which was considered by the United States Supreme Court in *Coleman v. Alabama*. . . . (*People v. Bellanca*, 194 NW2d at 865.)

Clear Michigan history reveals a consistent identity between Michigan Constitution, Article I, Section 20 and the Sixth Amendment.

The historical interpretation of Article I, Section 20 has not been altered in recent years. In the instant case, *People v. Bladel*, the court's use of the terminology "state constitutional counterpart" indicates a continuance of the analysis which views the constitutional provisions as identities. See *People v. Bladel*, *supra*, 421 Mich at 68. In a case subsequent to *Bladel*, the Michigan Supreme Court faced the question of whether Article I, Section 20 should be more expansive than the Sixth Amendment. Three Justices signed an Opinion holding a more expansive reading of Article I, Section 20 over against the reading of the Sixth Amendment. *People v. Gonyea*, 421 Mich 462, 481 ____ NW2d ____ (1984). Not only did the three votes not constitute a majority of the court, but the author of the *Bladel* Opinion specifically wrote a concurring Opinion in which he

agreed with the result reached by those who would give the expansive reading to Article I, Section 20 but specifically rested his agreement exclusively on the Sixth Amendment. *People v. Gonyea*, *supra*, 421 Mich 481-482.

The dissent in *Gonyea* garnered three votes, all of which constituted votes which rejected the suggestion of giving a broader interpretation to Article I, Section 20 than that given the Sixth Amendment. *People v. Gonyea*, *supra*, 421 Mich at 43. Moreover, one of the three votes in favor of the expansive reading of Article I, Section 20 was cast by a Justice who has now left the bench.

As noted in Respondent's brief, the concurrence in *People v. Bladel*, specifically objected to the inclusion of the reference to Michigan Constitution 1963, Article I, Section 20. The concurrence stated:

> I concur in Part III-C of my brother Cavanagh's Opinion with the exception, however, that since the *Edwards/Paintman* ruling derives from an analysis of the United States Constitution, I find it unnecessary and, indeed, inappropriate to base the result in these cases upon Const. 1963, art I, § 20.
>
> (*People v. Bladel*, 421 Mich at 75).

This statement should not be understood as indicating that Article I, Section 20 was an independent basis for the decision. This is especially true where the author of *Bladel* rejected the opportunity to give an expansive reading to Article I, Section 20 in *Gonyea*. The comment by Justice Ryan was an objection to the reference to Article I, Section 20 which was made completely out of context.

CONCLUSION

Michigan law has consistently molded Article I, Section 20 of the Michigan Constitution to fit the federal analysis of

the Sixth Amendment right to counsel. The *Bladel* decision did not rest on an adequate independent state ground. The Michigan Supreme Court was clearly compelled to construe Article I, Section 20 in conformity with its view of the Sixth Amendment. Therefore, at the very least, the Michigan Court cannot freely determine the application of state law to this question until it is freed from its misapprehension of federal law. The Writ of Certiorari should issue.

Respectfully submitted,

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